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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Satellite Delivery of Network Signals)
To Unserved Households for)
Purposes of the Satellite Home)
Viewer Act)
)
Part 73 Definition and Measurement)
Of Signals of Grade B Intensity)

CS Docket No. 98-201
RM No. 9335
RM N. 8345

To: The Commission

COMMENTS OF GRANITE BROADCASTING CORPORATION

GRANITE BROADCASTING
CORPORATION

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SUMMARY

Granite urges the Commission not to redefine the Grade B signal intensity for purposes of the Satellite Home Viewers Act (“SHVA”). The Commission does not have the statutory authority to redefine the definition of a signal Grade B intensity for purposes of the SHVA. The Commission’s tentative conclusion that Congress did not “freeze” the definition in the SHVA is not consistent with the SHVA, its legislative history, or recent court decisions interpreting and applying the SHVA. In addition, changing the signal coverage standard of the Grade B signal to more closely approximate a station’s present Grade A signal strength will invariably economically harm Granite’s stations significantly.

Finally, Granite supports the Commission’s proposal to adopt a relatively low cost, accurate, and reproducible methodology for measuring the presence of a Grade B intensity signal at a subscriber’s household. To that end, Granite urges the Commission to adopt the methodology in the Netlink/Primestar agreement.

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COMMENTS OF GRANITE BROADCASTING CORPORATION

Granite Broadcasting Corporation ("Granite"), by its attorneys, respectfully submits these Comments in response to the Notice of Proposed Rule Making ("NPRM")¹, released by the Federal Communications Commission ("FCC" or "Commission") on November 17, 1998. The NPRM requests comments on various issues involving the satellite delivery of network signals to unserved households under the Satellite Home Viewer Act ("SHVA").²

Granite,³ the largest minority controlled owner of television stations in the United States, owns and operates 10 television stations, eight of which are affiliated with one of the major four national television networks. As such, Granite would be adversely affected by any Commission

¹ Satellite Delivery of Network Signals To Unserved Households for Purpose of the Satellite Home Viewer Act, Notice of Proposed Rule Making, CS Docket No.98-201 (Nov. 17, 1998) ("NPRM").

² 17 U.S.C. § 119 (1988).

³ Through subsidiaries, Granite owns and operates the following stations: KNTV(TV)(ABC), San Jose, California; KBWB(TV)(WB), San Francisco, California; WTVH(TV)(CBS), Syracuse, New York; KSEE(TV)(NBC), Fresno, California; WPTA(TV)(ABC), Fort Wayne, Indiana; WEEK-TV(NBC), Peoria, Illinois; KBJR-TV(NBC), Superior, Wisconsin; KEYE-TV(CBS), Austin, Texas; WKBW-TV(ABC), Buffalo, New York; and WDWB(TV)(WB), Detroit, Michigan.

action to change the definition of a Grade B signal intensity under SHVA and is a party in interest.

For the reasons set forth below, Granite urges the Commission not to redefine the Grade B signal intensity for purposes of the SHVA. The Commission lacks the statutory authority to redefine the Grade B contour for purposes of SHVA.⁴ Moreover, the proposed change would detrimentally harm virtually all local network television stations and the localism objectives that are explicit in the FCC's broadcast regulatory scheme and in the Communications Act. Finally, determining under SHVA whether an individual household is served by a Grade B signal as presently defined by the FCC, Granite urges the Commission to adopt the test methodology patterned after the Netlink/Primestar Agreement.⁵

I. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO REDEFINE THE GRADE B INTENSITY LEVEL FOR PURPOSES OF SHVA

The Commission has proposed changing the definition of a signal of Grade B intensity on the basis that Congress did not intend to "freeze" the definition of a signal Grade B intensity for purposes of SHVA.⁶ The Commission has tentatively concluded that Congress did not freeze the definition in SHVA.⁷ Granite submits that the Commission's tentative conclusion is not consistent with SHVA, its legislative history, or recent court decisions interpreting and applying SHVA.

⁴ Specifically, the Commission lacks the statutory authority to grant the relief requested in the National Rural Telecommunications Cooperative ("NRTC") and EchoStar Communications Corporation ("EchoStar") petitions. The NRTC petition was filed on July 8, 1998 and placed on public notice on August 5, 1998. The EchoStar petition was filed August 18, 1998 and placed on public notice on August 26, 1998.

⁵ See Settlement and Compliance Agreement Between ABC, Inc. et. al. and Primestar Partners, L.P., Netlink USA, and Telluride Cablevision, Inc.

⁶ NPRM at ¶ 20.

⁷ Id.

Congress incorporated by reference into SHVA the Commission's Grade B definition and measurement procedures.⁸ By doing so, the FCC's definition of Grade B signal intensity was effectively frozen in SHVA. As a result, the FCC does not have authority to change its present Grade B definition for purposes of applying SHVA. Moreover, when it adopted SHVA, Congress did not direct the FCC to conduct a rulemaking on the Grade B signal intensity definition, providing additional support that the Commission does not have authority to change the definition.

Recent court cases analyzing and applying SHVA support the position that the FCC's present definition of a Grade B signal contour was incorporated into SHVA and can not be changed absent Congressional action. Thus, in ABC v. PrimeTime 24, the United States District Court for the Middle District of North Carolina (the "Raleigh Court") found that the SHVA was enacted to ensure the availability of network programming to those who cannot receive a signal of a Grade B intensity.⁹ SHVA defines an "unserved household" as "a household that (A) cannot receive, through the use of conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. Section 119(d)(10). The Raleigh Court concluded that Congress, and not the court, could amend the SHVA.¹⁰ The Raleigh Court concluded that "Congress clearly defined a Grade B signal based upon the FCC's objective standard and not on whether a household receives a picture of acceptable quality."¹¹ Therefore,

⁸ H.R. Ref. No. 100-887, Pt. I at 26 (1988).

⁹ ABC, Inc. v. PrimeTime 24 Joint Venture, 17 F. Supp. 2d 467 (M.D. N.C. 1998) ("ABC v. PrimeTime 24"). See also, H.R. Rep. 100-887(I), at 15.

¹⁰ ABC v. PrimeTime 24, 17 F. Supp. 2d 467; See also, CBS v. PrimeTime 24, 9 F. Supp. 2d 1333.

¹¹ Id.

the Raleigh Court concluded that the SHVA defines “unserved households” by reference to the FCC’s existing objective Grade B definition.

In CBS v. PrimeTime 24, the United States District Court for the Southern District of Florida (the “Miami Court”) found that Congress, in promulgating the SHVA, had endorsed the FCC’s definition of a signal of Grade B intensity.¹² Specifically, the Miami Court found that “Congress’ intent is supported by a House Judiciary Committee Report prepared a few weeks after it drafted the definition of ‘unserved households’ which stated that a signal of Grade B was as defined by the FCC, currently in 47 C.F.R. § 73.683(a).”¹³ In addition, the Raleigh Court found that this “understanding was replicated in the 1994 amendment to SHVA, which did not alter the definition of an unserved household.”¹⁴

Moreover, the Miami Court observed that the 1988 House Report showed that Congress had rejected a bill proposed by the satellite industry, which would have permitted viewers to receive network service by satellite if they submitted affidavits indicating that they did not receive adequate service over the air.¹⁵ The bill, if adopted, would have essentially replaced the test promulgated in SHVA, making it easier for satellite carriers to transmit network programming to subscribers who are located within the Grade B signal contour as presently defined by the FCC. The Miami Court emphasized that “when Congress has expressly considered and rejected a proposal to include particular provisions in a statute, ‘there could hardly be [a] clearer indication’ that a law does not have the meaning it would have had if the

¹² CBS v. PrimeTime 24, 9 F. Supp at 1340.

¹³ Id.; See also, H.R. Rep. No. 100-887, pt. 1, at 26 (1988).

¹⁴ ABC v. PrimeTime 24, 17 F. Supp. 2d 467.

¹⁵ CBS v. PrimeTime 24 at 1339; H.R. Rep. No. 100-887(1) at 8 (1988), reprinted in 1988 U.S.C.C.

proposal had been accepted.”¹⁶ In addition, the Miami Court recognized that a basic tenet of statutory construction is that a court should give the statutory language its ordinary and plain meaning.¹⁷ Thus, in both CBS v. PrimeTime 24 and ABC v. PrimeTime 24, the courts determined that SHVA and its legislative history are clear that Congress intended that the Commission adhere to and not alter the definition of a signal Grade B intensity as applied in the SHVA.

Congress had two purposes in passing the Act: (1) to enable households located beyond the reach of a local affiliate’s broadcast signal to obtain access to network programming via satellite; and (2) to preserve the existing national network-local affiliate television program distribution system.¹⁸ Congress drafted SHVA with the FCC’s definition of signal Grade B intensity in mind. As the courts have observed, a plain reading of SHVA proves Congress’ intention, as does a review of its legislative history. In light of the foregoing, the only governmental body that has authority to modify the definition of a signal Grade B intensity for purposes of SHVA is Congress, not the Commission.

II. A REVISION OF THE GRADE B INTENSITY FOR SHVA PURPOSES WILL DETRIMENTALLY HARM GRANITE’S LOCAL STATIONS

The Commission has proposed changing the method for defining served and unserved households.¹⁹ While acknowledging that it cannot modify the definition of Grade B intensity so much that it effectively equals or exceeds the intensity of a Grade A signal, the Commission’s

¹⁶ Id. at 1339, citing Tanner v. United States, 483 U.S. 107, 125, 97 L. Ed 2d 90, 107 S. Ct. 2739 (1987).

¹⁷ CBS et. al. v. PrimeTime 24, 9 F. Supp.2d 1333, 1339 (S.D. FL., May 13, 1998) (“CBS v. PrimeTime 24”), citing Caminetti v. United States, 242 U.S. 470, 485, 61 L.Ed. 442, 37 S. Ct 192 (1917); United States v. Scrimgeour, 636 F.2d 1019, 1022 (5th Cir. 1981).

¹⁸ H.R. Rep. No. 100-887(1) at 8 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5611.

¹⁹ NPRM at ¶ 27.

proposal to use the Longley-Rice propagation model, as implemented for DTV, to refine the Grade B service prediction for purposes of SHVA effectively would increase the strength of the Grade B signal to more closely approximate a station's present Grade A signal strength. Such a change would, in effect, eliminate the existing Grade B contour as the standard for service to households under SHVA. The existing Grade B standard would be replaced by one which effectively will permit unlimited satellite distribution of a distant network signal to any household not receiving an off-air network signal of Grade A intensity or greater. Changing the signal coverage standard in the manner proposed by the FCC would be a crushing blow to all local network stations because satellite carriers do not retransmit the signals of local network affiliates to households within the local stations' Grade B service contracts.²⁰ Instead, a satellite carrier contracts with one affiliate of each national network in a region to secure the right to broadcast the programming from that network affiliate to all television households in the region unserved by an affiliate of that network. Under this approach, the satellite carrier often deletes the particular affiliate's local advertising and substitutes its own national advertising.²¹

As attested to by the plaintiffs in CBS v. PrimeTime 24, these type of arrangements upset the network/affiliate relationship because satellite subscribers are deprived of local network programming provided by the local affiliate since the satellite carrier does not retransmit the local affiliate's programming or advertising to its subscribers.²² Thus, adoption of the Commission's proposal will significantly adversely affect Granite's stations. Specifically, the Commission's proposal will increase the number of households entitled to receive distant

²⁰ CBS v. PrimeTime 24, 9 F. Supp. 2d at 1336.

²¹ Id.

²² CBS v. PrimeTime 24, 9 F.Supp. 2d at 1337.

network signals; the size of the audience watching local stations; and the amount of revenues generated from advertising by local network stations will shrink as the local network affiliate's audience size declines. Simply stated, fewer viewers mean lower ratings and less advertising revenues. The reduction in the local station's revenue stream will have a corresponding impact on the local network station's ability to continue to provide high quality local news and public affairs programming to the communities it serves. Like most local network affiliates, Granite's stations provide an invaluable service to the communities they serve by broadcasting local news and other local community affairs programming directed to the interests and needs of the local community. For example, Granite station KNTV(TV), Fresno, California, provides award-winning local news and public affairs programming. During the week, KNTV(TV) provides local news four times a day at 5:30 a.m. (90 minutes); 5:00 p.m. (60 minutes) ; 6:00 p.m. (60 minutes); and 11:00 p.m.(35 minutes). On the weekends, KNTV(TV) provides local news at 6:00 p.m.(30 minutes) and 11:00 p.m. (30 minutes). KNTV(TV) also provides weekly community affairs programming. Specifically, KNTV(TV) provides a program called "Comunidad Del Valle," which concentrates on issues affecting the Spanish community of the South Bay area. KNTV(TV) also provides a program called Datebook, which is a broad based community program. In addition, KNTV(TV) provides yearly prime time specials. For example, thus far in 1998, KNTV(TV) has provided local programming on the following issues and special events: diabetes; children's health; opening of The Tech Museum of Innovation; the San Jose holiday parade; and a primetime drive to promote donations for the local food-bank.

Adoption of the Commission's proposal has been estimated to reduce the size of a local network station's potential audience by as much as 15% to 20%.²³ A reduction of station revenues by such an amount at Station KNTV(TV), for example, would seriously impair station KNTV(TV)'s ability to generate the revenues needed to continue to fund its award-winning local news and public affairs programming.

In the NPRM, the Commission acknowledged and reiterated Congress' decision in SHVA to protect network-affiliate relationships and to foster localism in broadcasting.²⁴ The Commission recognized that if it changes the number of viewers predicted to receive a local network station with a Grade B signal, it might substantially affect the policies enumerated by Congress. As the Commission has stated, localism is central to the Commission's policies governing broadcasting and the obligation of broadcasters to service the public interest.²⁵ If the Commission changes the current Grade B standard to allow satellite carriers to transmit a distant network signal and programming to as many as 15% to 20% of the television households presently within the local network affiliate's Grade B contour, such a result will significantly impair the local network affiliate's ability to maintain its present level of news and public affairs programming. Indeed, the economic impact may be so devastating as to imperil or, at a minimum delay the station's conversion to digital television. Such a result was never intended by Congress and should not be permitted.

²³ Granite presently is reviewing the impact on each of its ten stations of the FCC's proposal to use the Longley-Rice model, as implemented for digital television, for measuring the Grade B signal and will specifically address the impact of the proposal on its stations in its reply comments in this proceeding.

²⁴ NPRM at ¶ 36.

²⁵ Id.

III. THE COMMISSION SHOULD ADOPT THE TEST METHODOLOGY FOR MEASURING THE PRESENCE OF GRADE B INTENSITY AS USED IN THE NETLINK/PRIMESTAR AGREEMENT

In order to contest whether a household is served or unserved, the SHVA permits individual testing of a household.²⁶ Because of the importance of this key safety net mechanism, Granite supports the FCC's proposal to adopt a relatively low cost, accurate, and reproducible methodology for measuring the presence of a Grade B intensity signal at a subscriber's household. Currently, the FCC's regulations do not define how the signal strength at a subscriber's household should be measured.²⁷ The FCC's rules, however, require that field strength measures be made utilizing a receiving antenna, elevated thirty feet above the ground and oriented toward the strongest signal, measured over a mobile run of at least 100 feet.²⁸ The satellite and broadcast industries have not been able to agree upon an industry standard for conducting these measurements.²⁹ Thus, the FCC should adopt a methodology for measuring the presence of a Grade B intensity signal at a subscriber's household. By adopting such a methodology, there will be consistency and accuracy in determining the presence of a Grade B signal at a subscriber's household and disagreement between satellite television stations and satellite carriers will be reduced significantly and possibly eliminated.

To that end, Granite urges the Commission to adopt the methodology in the Netlink/Primestar agreement.³⁰ This methodology depicts the particular method for determining

²⁶ 17 U.S.C. § 119; See also, 47 C.F.R. 686.

²⁷ ABC v. PrimeTime 24, 17 F.Supp. 2d 467.

²⁸ 47 C.F.R. § 73.686(b)(2).

²⁹ ABC v. PrimeTime 24, 17 F.Supp. 2d 467.

³⁰ Settlement and Compliance Agreement Between ABC, Inc. et. al. and Primestar Partners, L.P., Netlink USA, and Telluride Cablevision, Inc.

the signal strength of a television station at the viewer's household. For example, the Netlink/Primestar agreement calls for use of a standardized antenna – the channel master model 3016 antenna (along with 50 feet of RG/6U cable) or such other standardized antenna to which the satellite carrier and television station may agree, rather than the homeowner's own receiving equipment. In addition, the Netlink/Primestar agreement requires that the antenna be pointed in the direction in which the strongest signal is available from the station in question. The Netlink/Primestar agreement also provides specific requirements as to where in proximity to the viewer's household the test should be conducted. Specifically, the Netlink/Primestar agreement requires that a cluster of five measurements be taken either (i) as close to the home as possible³¹ given safety and other constraints, or (ii) at the nearest public road from which measurements can safely be made. The minimum distance between five points must be small enough to make testing practical. Finally, the Netlink/Primestar agreement requires that in the case of disagreement between the broadcaster's and satellite carrier representations over the testers procedures, a mutually acceptable third party engineer shall conduct a new test.

CONCLUSION

Granite strongly opposes the Commission's proposal to change the definition of the Grade B intensity level for purposes of the SHVA. By proposing to redefine the Grade B contour, the FCC is significantly increasing the number of television viewers entitled to receive distant network signals with satellites with a corresponding decrease in the number of people watching local network stations. Local network affiliates throughout the country and the viewing public will be significantly adversely impacted as a result. The FCC lacks the statutory authority to redefine the Grade B signal intensity for purposes of the SHVA. Thus, the ultimate


³¹ The agreement specifies that the test in most cases be conducted in the driveway.

resolution of this controversy is for Congress to preserve the existing national network-local affiliate television program distribution system as contemplated by SHVA. The only modifications to SHVA that is possible is to require satellite carriers to retransmit the network signals of local affiliates.

Based on the foregoing, Granite respectfully urges the Commission not to redefine the Grade B signal intensity for purposes of the SHVA. In addition, Granite urges the Commission to adopt the test methodology for measuring the presence of Grade B intensity as used in the Netlink/Primestar agreement.

Respectfully submitted,

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